SUPREME COURT OF APPEALS OF VIRGINIA.

NORFOLK & W. RY. CO. v. BRIGGS.

Sept. 29, 1904.

[48 S. E. 521.]

RAILROADS—FIRES—NEGLIGENCE—EVIDENCE—ADMISSIBILITY—APPEAL.

1. In an action against a railroad for alleged negligence in setting fire to property by sparks from its engines, after plaintiff has identified the engine alleged to have communicated the fire complained of, he is not entitled to introduce other evidence as to fires having been communicated along the defendant's right of way without having first shown that such other fires were communicated from the same engine.
2. Where it appears on appeal that illegal evidence has been admitted, the judgment must be reversed, as it cannot be said what effect it may have had on the minds of the jury.
3. In an action against a railroad for setting fire to property by sparks from its engines, testimony as to the speed of a train at a point about two miles distant from the scene of the fire is inadmissible.
4. Where a witness had testified touching a fire near the defendant's right of way, it was error to permit him to answer the question whether he saw anything from which the fire could have started except the railroad.
5. The refusal of the court to permit a witness to testify, at the instance of the defendant, with reference to fires in the same vicinity, set out by duly equipped locomotives on the lines of other railways, was proper.
6. That in the examination of the plaintiff leading and improper questions were propounded is not cause for reversal, the defendant having been left free to cross-examine the witness.
7. It was proper to permit the plaintiff in an action to recover for a stock of merchandise destroyed by fire to give an estimate of the total amount of purchases made by him while he had occupied the property up to the time of the fire and his annual sales during the same time.
8. It was proper to allow a witness to state the valuation of the goods plaintiff had on hand on the day prior to the fire based on a cursory view, not made with any purpose of valuation, nor any expectation such as would have caused him to give special attention to the matter.
9. It was not error to permit a witness to give an estimate of the value of the goods seen at plaintiff's store two days before the fire.

Error to Circuit Court, Warren county.

Action by Robert L. Briggs against the Norfolk & Western Rail-

way Company. Judgment for plaintiff, and defendant brings error. *Reversed.*

Downing & Richards, for plaintiff in error.

A. J. Moore, for defendant in error.

CARDWELL, J.

This action was brought by the defendant in error, Robert L. Briggs, to recover from the plaintiff in error, the Norfolk & Western Railway Company, damages sustained by reason of the loss of a stock of merchandise by fire, which it is alleged was communicated to the building containing the merchandise in question from an engine of the plaintiff in error on the 13th of November, 1901.

The building was situated on the east side of the railway tracks at Ashby station, about 33 feet from the main line, and there was within 15 feet of this building a warehouse. On the day named the fire was discovered on the roof of the warehouse, about 20 minutes after train No. 88, drawn by engine No. 169, had passed the buildings, going north. The warehouse burned, and communicated the fire to the building occupied by the defendant in error, and both were totally destroyed.

It appears from the evidence that, if the fire was caused by the plaintiff in error, it emanated from this particular engine.

The jury rendered a verdict in favor of the defendant in error assessing his damages at $2,600, with interest, and the court, having refused to set the verdict aside, rendered judgment thereon, and from that judgment the case is before us on a writ of error awarded by one of the judges of this court.

The first question to be considered arises out of the exceptions taken to the rulings of the circuit court admitting evidence introduced by the defendant in error over the objection of the plaintiff in error.

The declaration charged that the fire was caused by sparks or ignited cinders thrown upon or against the building from one of plaintiff in error's engines—that is, by sparks emitted from the smokestack; the negligence thereby imputed being that the engine setting out the fire was not properly equipped with a spark arrester, or that the engine in question was not operated with due care and caution.

After the introduction of evidence to show that the fire was com-

municated to the building from a certain engine in use by the plaintiff in error which passed Ashby station about 20 minutes before the fire on the roof of the warehouse was discovered, defendant in error introduced evidence to prove that other fires had originated along plaintiff in error's right of way, without showing first that these fires were set out by the engine alleged to have communicated the fire to the building at Ashby, or that they were set out by reason of plaintiff in error failing to provide its engines with reasonably safe spark arresters, or to use due care and caution in the conduct and management of the engines from which these fires were communicated. The precise question, therefore, presented is whether or not, after the plaintiff in an action of this character has identified with certainty the engine alleged to have communicated the fire complained of, it is admissable to introduce other evidence as to fires having been communicated along the railway's right of way, without having first shown that these other fires were communicated from the engine in question.

In *Brighthope Ry. Co.* v. *Rogers,* 76 Va. 445, the engine in question was identified, and the court held that evidence of other fires caused by the same engine was admissable.

In *New York, P. & N. R. Co.* v. *Thomas,* 92 Va. 606, 24 S. E. 264, such evidence was admitted without objection, and the court merely held that the lower court did not err in instructing the jury that it might consider this evidence after it had been thus admitted.

In *Patteson* v. *C. & O. Ry. Co.,* 94 Va. 16, 26 S. E. 393, the evidence admitted was as to other fires caused by the same engine.

The case of *Kimball & Fink* v. *Borden,* 95 Va. 203, 28 S. E. 207, seems to sustain the admissibility of evidence as to other fires in a case like the present, but the record in that case shows that, after the offending engine was identified in the course of the trial, no evidence of fires caused by other engines was objected to, and therefore the question here under consideration was not involved in the ruling of the court.

In *White* v. *New York & N. R. Co.,* 99 Va. 357, 38 S. E. 180, the engine was identified, and all that was said by this court which has any sort of bearing upon the question under consideration was: "Notwithstanding these conditions, so inviting to fire from the sparks of a passing engine, it is an established fact in this case that no fire occurred at any point along the entire route, other than that

alleged in this case, as a result of sparks emitted by the engine in question after it came from the repair shops." Whether or not this is to be considered as an implied recognition that the only evidence as to other fires which would have been competent would have been as to fires caused by sparks emitted by the engine in question, it is not authority for the proposition that evidence is admissible as to other fires not shown to have been set out from the engine in question. Nor does the case of *N. & W. Ry. Co.* v. *Perrow,* 101 Va. 345, 43 S. E. 614, have any bearing upon the question here, as all of the evidence in that case was as to sparks emitted and fires caused by the same train which caused the fire in question.

Plaintiff in error here, as we have seen, is not charged with the general habit of negligence, nor with frequent defects in its engines. Therefore, if convicted of negligence in this case, it must be by proof of defects in the engine No. 169, or of the omission of duty upon the part of the crew which operated it upon the day of the fire which destroyed the property of defendant in error.

The question here under consideration has repeatedly arisen and been passed upon by the highest courts in other states, which have uniformly held that, where the engine was identified which it was claimed had set out the fire, evidence as to other fires along the line of the railway, not shown to have been set out by the identified engine, is not admissible.

In *Hygienic Plate-Ice Mfg. Co.* v. *Raleigh & Augusta A. L. R. R. Co.,* 126 N. C. 797, 36 S. E. 279, the opinion says: "This evidence of fires at various times and at other places, caused by sparks from other engines, both before and after August 29th, we must hold to be incompetent, as it does not tend to prove the condition of engine No. 228, nor to throw any light on the question directly before the jury. It is well calculated to divert the mind of the jury, and lead them to an unsafe verdict."

In *Henderson* v. *P. & R. Ry. Co.,* 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652, it was held that, where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded. That case, in many particulars,

is very like the case here under consideration. See, also, *Adkins* v. *Georgia Ry. etc. Co.*, 111 Ga. 815, 35 S. E. 671; *Jacksonville etc. Ry. Co.* v. *Peninsula etc. Co.* (Fla.), 9 South. 661, 17 L. R. A. 33, 65; *Ireland etc.* v. *Cinti, W. & M. Co.* (Mich), 44 N. W. 426.

In *Lesser Cotton Co. etc.* v. *St. L. etc. Ry. Co.*, 114 Fed. 136, 52 C. C. A. 95, after it was established that the only engine which could have set the fire was the defendant's engine No. 577, evidence of other fires alleged to have been set out by other engines of the defendant, or that other engines of the defendant were in the habit of throwing igniting sparks at other times and places, was offered and rejected. The opinion by Sanford, J., says: "The only question at issue was whether or not engine No. 577 set the fire. If the offer of counsel had been to show that some of the engines of the defendant set fires at other times and places, it might have formed the basis for a more plausible argument, because it might have been said that engine No. 577 might have been one of the engines which set fires at other times. This, however, was not their offer. Their proposal was to prove that other engines threw sparks sufficiently large and live to set fires. They did not offer to show that such engines were constructed in the same way, or were in the same condition, as the locomotive which alone could have set the fire. How this testimony could have had any tendency to lead a rational mind to the belief that engine No. 577 was the cause of this fire, passes our understanding. Neither the fact that other engines set fires, nor the fact that they threw sparks, nor the fact that their operators were in the habit of negligently constructing, repairing, or caring for them, had any logical or rational tendency to show that the engine here in question either set the fire, threw the sparks, or was negligently cared for or operated, because there was better and conclusive evidence upon all these questions—the evidence of its actual construction and condition and of the method in which it was actually operated at the time when the fire occurred."

That case is in point here, and numerous authorities are cited in the opinion of the court to sustain the conclusion reached.

Another case in point is *Inman* v. *Elberton A. L. R. Co.*, 16 S. E. 958, 35 Am. St. Rep. 232, where the question was whether the fire in question was set out by one or the other of two distinctly identified engines, and it was not claimed that the fire was caused by any other, the opinion saying: "The question before the jury was whether it was caused by one of these, and the negligence al-

leged was negligence in the condition and management of these two. How, then, could it be material or relevant to show negligence on other occasions, and in regard to other engines than these, especially when there was no attempt to show that such other engines were of like construction. The cases cited in support of the contention that this testimony should have been admitted are clearly distinguishable from the present case. In some of them the evidence as to other occasions related to the particular engine which was alleged to have caused the fire, and in the other cases the engine that caused the fire was not identified. Where the engine that caused the fire cannot be fully identified evidence that the defendant's engines frequently emitted sparks on former occasions near the time of the fire in question is generally held to be relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter. But when the engine is identified the same reason does not operate, and evidence as to the condition of other engines and of their causing fires is clearly irrelevant."

The text-writers sustain the view taken in the cases above cited. See 2 Shearman & Redfield on L. of Neg. (5th ed.), sec. 675, and notes; 3 Elliott on Railroads, sec. 1245.

As well remarked by counsel in the argument of the case here, plaintiff in error might have had other defective engines; its employes may have been guilty on other occasions of negligence of the most culpable character; yet if engine No. 169, and all of its attachments, so far as these were connected with the prevention of fires, were on the 13th of November, 1901, such as the law prescribes, and if the crew which was operating it upon that day at the time it passed Ashby station were guilty of no omission of duty, then plaintiff in error could not in this case be held liable for the fire in question.

"The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. This court has repeatedly held that, when liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is incumbent upon such

a plaintiff to furnish evidence to show how and why the accident occurred; some fact or facts by which it can be determined by the jury, and not be left entirely to conjecture, guess, or random judgment, upon mere supposition, without a single known fact." *Chesapeake & O. Ry. Co.* v. *Heath* (just decided by this court), 48 S. E. 508, and the authorities there cited.

The evidence set out in bills of exceptions 1, 2, and 3 was illegal, and should have been rejected.

"It is a well-settled rule of this court that, where illegal evidence has been admitted, the judgment must be reversed, as it cannot be said what effect the illegal evidence may have had on the minds of the jury." *Southern Mut. Ins. Co.* v. *Trear,* 29 Gratt. 255, and authorities there cited.

At the trial the testimony of Charles Fuller was introduced by defendant in error, over the objection of plaintiff in error, as to the speed of the train at a point a mile and a half or two miles distant from the scene of the fire in question, and this is assigned as error. We are of opinion that this evidence was wholly irrelevant, and should have been rejected.

A witness—David Wedlock—having testified touching a certain fire near the right of way of plaintiff in error, was allowed to answer the question whether he saw anything from which the fire could have started except the railroad, to which he made a negative reply; and this also is assigned as error.

We are of opinion that the question was not only leading and suggestive, but called merely for an opinion of the witness, which was improper, and should not have been permitted.

The next assignment of error is to the refusal of the circuit court to permit a witness to testify at the instance of the plaintiff in error, with reference to fires in the same vicinity, set out by duly equipped locomotives on the lines of other railway companies. This evidence was clearly irrelevant, and was properly rejected.

The next assignment of error relates to the manner of the examination of defendant in error as to what his stock of goods consisted of, and the contention is that the questions propounded were leading and improper.

The questions propounded to the witness were unmistakably leading or suggestive questions, but it cannot be said that plaintiff in error was prejudiced thereby, since it was left free to cross-examine

the witness touching his examination in chief, and thus test his accuracy, veracity, and credibility.

"When and under what circumstances a leading question may be put is in the discretion of the trial court, and, as a general rule, is a matter which cannot be assigned as error. 1 Greenleaf on Ev., sec. 435. But, if it could be, no injury resulting to the opposing party in allowing the question to be asked, it would not be reversible error." *Richmond etc. Ry. Co.* v. *Rubin* (Va.), 47 S. E. 834.

The seventh assignment of error is to the ruling of the trial court permitting the defendant in error to give to the jury an estimate of the total amount of purchases made by him since he had occupied the location at which he was at the time of the fire, and his annual sales from the same date.

This evidence may be of little value, but it was not error to permit it to go to the jury, to be considered by them for what it was worth. The owner of a stock of goods destroyed by fire is often unable to produce the best and most direct evidence as to the value of the goods, and he can only be required to prove their value by the best evidence obtainable.

What was said with reference to the next preceding assignment of error applies to the eighth and ninth assignments. In the eighth a witness was allowed to give the valuation of the stock of goods which the defendant in error had on hand on the day prior to the fire, based upon a cursory view, not made with any purpose of valuation, nor any expectation such as would have caused him to give especial attention to the matter; and in the ninth the matter complained of is the admission of the estimate of a witness of the value of the goods seen at the store two days before the fire. We do not think that the plaintiff in error could have been prejudiced by that evidence. It was of little value, and was doubtless so considered by the jury.

The eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments of error relate to the action of the trial court in giving certain instructions for defendant in error, the refusal of certain instructions asked for by the plaintiff in error, and the giving of the court's own instructions in lieu of those refused.

We shall not attempt to review these several assignments of error, as we consider it sufficient to say that the instructions given covered

the whole law of the case, stated in a plain and careful manner, so as to guard the rights of both parties.

The remaining assignment of error is to the refusal of the court to set aside the verdict of the jury as contrary to the law and the evidence, and because the verdict is excessive. As the case has to go back for a new trial on the grounds hereinbefore stated, we deem it inexpedient to discuss the evidence certified in the record.

The judgment of the circuit court will be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with the views herein expressed.

Reversed.

NOTE.—The above well considered opinion reviews all of the Virginia cases of importance on the subject before the court, and, after classifying and distinguishing them, lays down the clear-cut rule that, in an action against a railway company for alleged negligence in setting fire to property by sparks from its engines, if the plaintiff identify the engine alleged to have communicated the fire complained of with certainty, it is inadmissible to introduce other evidence as to fires having been communicated along the railway's right of way, without having first shown that these other fires were communicated from the engine in question. This, as stated by the court, has been the uniform decision of the courts of other States. *Jacksonville etc. Ry. Co.* v. *Peninsula Land Co.*, 27 Fla. 1; *Ireland* v. *Cincinnati etc Ry. Co.*, 79 Mich. 163; *Burroughs* v. *H. Ry. Co.*, 38 Am. Dec. and extensive note; *Inman* v. *Elberton etc Ry. Co.*, 90 Ga. 667, 35 Am. St. Rep 235, 16 S. E. 959; *First National Bank* v *Lake Erie etc Ry. Co.*, 174 111 42, 50 N. E. 1026; *Missouri etc. Ry. Co* v. *Wilder* (Ind. Ter.), 53 S. W. 494, and *Gibbons* v. *Wisconsin etc Ry. Co*, 58 Wis. 339, 17 N. W. 133

In reading the principal case there are several important questions which present themselves.

1st. Whether the plaintiff may avoid the consequences of the above rule by simply omitting to identify the engine causing the damage?

2d. Whether the rule would apply where the declaration alleged the "general habit of negligence," and "frequent defects in engines?" Judge Cardwell in delivering the opinion says, "The plaintiff in error is not charged with the general habit of negligence nor with frequent defects in its engines. *Therefore*, if convicted for negligence in this case it must be by proof of defects in engine 169." The use of this language would seem to indicate that the plaintiff might have been permitted to prove that fires had been communicated by other engines along the defendant's right of way if his allegations had been sufficiently broad.

3d. Whether evidence of fires caused by other engines would be admissible if it were shown that such other engines were equipped with a spark arrester of like construction as the one on the engine which caused the damage sued for? This question is suggested by the language used in the cases of *Inman* v. *Elberton*, 16 S. E. 958, and *Lester Cotton Co.* v *Ry Co.*, 114 Fed 136, which language is quoted with approval in the principal case. In Virginia it will be remembered that railroads are required to avail themselves of "the best mechanical contrivances and inventions in known practical use to prevent the burning of property by the escape of fire." *White* v *V. Y. etc. Ry Co.*, 99 Va. 357, 358. See also Va. Code Anno., sec. 1264 and note, and sec. 1294d (18). G. C. G.